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Supreme Court, U.S.
FILED
APR 2 1996
CLERK

No. 95-1405

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SANDRA LAMB,

Petitioner,

vs.

CITIBANK, N.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PROSKAUER ROSE GOETZ
& MENDELSOHN LLP
By: PAUL SALVATORE, ESQ.
Counsel of Record for Respondent
1585 Broadway
New York, New York 10036
(212) 969-3022

Of Counsel:
MARK D. LURIE, ESQ.

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err when, in citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) — and applying the three step analysis outlined there — it affirmed the District Court's grant of summary judgment based on a finding that Petitioner in this employment discrimination case had failed to offer *any* evidence that Respondent Citibank, N.A.'s proffered non-discriminatory reasons for her termination were pretextual?

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Citibank, N.A. ("Citibank") is a wholly owned subsidiary of Citicorp. Citibank does not have any subsidiaries whose shares are publicly traded. The following are non-wholly owned Citibank subsidiaries:

Alarm Holdings, Inc.
American Italian Pasta Company
BPS Holding Corporation
Cable Systems Holding Company
Careercom Corporation
Chromcraft Revington
Citicorp Mezzanine Partners, L.P
Condere Corporation
Corral America Holdings, Inc.
Cort Business Services
Cuban American Nickel Company
Davco Food, Inc.
Delco Remy International, Inc.
Delta Commodities, Inc.
Electrocal Designs, Inc.
Fairmarkets, Inc.
FF Holdings Corporation
Frederick's Fine Chocolates, Inc.
FSI Holdings, Inc.
Galey & Lord Holdings
GCIH, Inc.
Glenoit Universal, Ltd.
GVC Holdings (c/o Ameripol Sympol)
Hancor, Inc.
Havco WP, Inc.
Haydon Corp.
HII Holdings, Inc.
Huntsville Television Holding Corp.
Hydrochem Holding, Inc.

International Airmotive Holding Corp.
International Media Group
Kraftube Management, Inc.
Marine Optical, Inc.
Milk Specialties Company
MM Holding Corp.
Mohawk Industries, Inc.
NAC Holding Inc.
One Sansome Street Associates
Palomar Technologies Corporation
Pinnacle Apparel Group
Plantronics Inc.
Polar Tank Holding, Inc.
PTI, Inc.
Rax Restaurants, Inc.
Res Associates of Georgia, Ltd.
Sansome Land Associates
Simmons Holding Corporation
Southern Coil Processing Inc.
Sterling Healthcare Corporation
Sybron Chemicals, Inc.
The Terraces L.C.
Triumph Group Holdings, Inc.
U.S. Air Shuttle, Inc.
Unisa Holdings Incorporated
Vectura Group, Inc.
WB Bottling Company
Westward Communications, Inc.
World Subordinated Debt Partners, L.P.
Zatarain's Brands, Inc.

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PRELIMINARY STATEMENT

In this race discrimination action under Title VII of the Civil Rights Act of 1964 ("Title VII"), Petitioner Sandra Lamb ("Lamb") failed to offer *any* evidence that Citibank, N.A.'s ("Citibank" or the "Bank") reasons for her employment termination were pretextual. It is well-settled — by decisions of this Court and all twelve Courts of Appeals — that the employer must prevail under Title VII if the plaintiff fails to offer any evidence that the employer's proffered legitimate, non-discriminatory reasons are pretextual. On this basis, the United States Court of Appeals for the Second Circuit affirmed the District Court's grant of summary judgment for Citibank.

As is obvious from her petition, Lamb quarrels with the lower courts' determinations regarding her total lack of pretext evidence and her failure to raise a genuine issue of material fact with respect to Citibank's legitimate non-discriminatory reasons for her termination. But apparently recognizing that this Court rarely grants petitions for certiorari when the asserted error concerns the lower courts' evaluation of such record evidence, Lamb has concocted a "legal issue" in a transparent attempt to obtain certiorari. Lamb's so-called "legal issue," however, was irrelevant to the disposition of this case and therefore provides no basis for review by this Court.

Lamb "seeks to have this Court clarify its . . . language" in *Saint Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). (Petition ("Pet.") 8) This request is specious, as the Court of Appeals did not mention or rely upon *Hicks* in its one paragraph decision. Rather, both the Court of Appeals and the District Court applied the well-established three step *Burdine* analysis. As Lamb failed to present *any* evidence that Citibank's proffered reasons for her termination were false, there is no need here — just as there was no need before the Court of Appeals — to reach the issue addressed in *Hicks*. Lamb's petition therefore should be denied.

COUNTERSTATEMENT OF THE CASE

Lamb commenced this action against Citibank on or about April 6, 1993 in the United States District Court for the Southern District of New York.[1] She alleged that Citibank discriminated against her on the basis of her race, in violation of Title VII, when it terminated her employment as part of a reorganization. Lamb further alleged that Citibank had violated 42 U.S.C. §§ 1981 and 1983, and that Citibank had inflicted emotional distress upon her as a result of her termination.

The parties had a full opportunity to conduct discovery, and Lamb served discovery requests and deposed several Citibank employees. At the conclusion of discovery, Citibank moved for summary judgment. The parties extensively briefed the issues raised in the summary judgment motion.

By Order dated September 9, 1994, Judge Michael B. Mukasey granted Citibank's Motion for Summary Judgment, and dismissed the complaint in its entirety.

On or about October 14, 1994, Lamb filed a notice of appeal in the United States Court of Appeals for the Second Circuit. Lamb appealed only that portion of the District Court's order granting summary judgment on her Title VII claim.

The Court of Appeals heard argument on September 5, 1995. On September 11, 1995, the Court of Appeals issued a unanimous three sentence opinion. After reviewing the record

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[1] Prior to commencing this action, Lamb filed a charge of discrimination with the Equal Employment Opportunity Commission and the New York State Division of Human Rights ("SDHR"). Following two days of Lamb's testimony before the SDHR, the administrative judge issued an opinion and order dismissing her complaint with prejudice, finding that Lamb "failed to establish a *prima facie* case of discrimination and had abandoned her case." (Pet. 15-16)

in the District Court, the Court of Appeals found that Lamb "failed to offer any evidence that Citibank's proffered non-discriminatory reason for her termination was pretextual," and therefore affirmed the District Court's grant of summary judgment. (Pet. 12)

COUNTERSTATEMENT OF THE FACTS[2]

Lamb is an African-American woman who began working for Citibank in September 1977[3] as an Area Marketing Manager. In May 1987, Lamb was an Assistant Vice President, when Citibank placed her into its Affluent Marketing Group to assist in the Priority Services Program, which specialized in services and products for Citibank's more affluent customers. Before the transfer, Lamb had worked in a variety of positions that related principally to marketing banking products in Citibank's branches.

In August 1987, Citibank suspended the Priority Services Program and transferred Lamb to the FOCUS Marketing Unit, another division of the Affluent Marketing Group. The FOCUS product provided Citibank's wealthier customers with a cash management account, which combined consumer banking services, a line of credit and discount brokerage products, including stocks, bonds, and other regulated securities not offered directly to regular customers. Lamb's responsibilities within FOCUS were to create, develop, and execute a training program for the Regional Marketing Representatives and Customer Service Representatives.

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[2] These facts are taken from the District Court's decision, which was based upon the undisputed record evidence. (District Court Opinion, Pet. 14-22)

[3] In an apparent typographical error, the District Court stated that Lamb commenced her employment in 1979. (Pet. 14)

In January 1988, Citibank underwent a major consolidation and reorganization that included restructuring the various Northeast Division marketing departments along functional rather than geographic lines. As part of this restructuring, Citibank created a new centralized marketing group that included a smaller Affluent Segment Marketing Group with responsibility for the FOCUS product. Because this new marketing group was significantly smaller than the previous Northeast Division group, senior marketing management had fewer officer-level positions available in the new organization. The four criteria used by senior management to select the new officers were: 1) specific skills and competency levels; 2) prior experience and achievements; 3) over-all performance evaluation/contribution; and 4) length of service. To aid in the selection process, the management officer of each candidate filled out a Skills Assessment Form that summarized the candidate's skills, experience, and other pertinent job-related information.

Lamb, along with 27% of the officers formerly working within the Northeast Division, was denied a position in the new, streamlined unit. Although Lamb claimed that similarly situated white employees were "chosen over her despite the fact that she had pristine qualifications," Lamb could not adduce any evidence that Citibank's assessments of the white employees' qualifications were inaccurate, let alone racially motivated. Her past performance in the branch or regional marketing levels was not directly relevant to her potential performance in the new FOCUS group. She received only a "good" ranking, and there was a serious gap in her knowledge of the securities business, which was necessary to market the FOCUS product. For example, Citibank submitted Lamb's sworn testimony in which she admitted that she *did not know* the difference between a stock and a bond. Lamb also admitted that she lacked "classical marketing skills" and that her greatest strength was in branch-related marketing as opposed to divisional marketing. Further,

two white employees with comparable, if not superior records, also failed to gain employment in the new group.

Citibank arranged three interviews for Lamb for other positions within the Bank; none resulted in her being placed in a new job at Citibank. Citibank also arranged interviews for other terminated employees, and successfully placed another African-American officer who had been displaced by the reorganization into another position at the Bank.[4] After Lamb was unable to secure another position within Citibank, she resigned on August 25, 1988, and received full salary through March 7, 1989.

OPINIONS BELOW

The District Court accepted Lamb's allegations and recitation of facts as true. Applying the three step analysis outlined in *Burdine*, the District Court first determined that Lamb "has barely met the minimum requirements" for establishing a *prima facie* case. (District Court Opinion, Pet. 18) The District Court then observed that:

> Defendant has offered legitimate, nondiscriminatory reasons for its actions: a

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[4] With respect to Lamb's assertion that the fact that Anne Marie Fiesel ("Fiesel") — a Caucasian employee with a comparable and arguably superior record whose position had also been eliminated — located another Citibank position is evidence of discrimination, Citibank submitted Fiesel's Skills Assessment Form, in which Fiesel's ratings were higher than those received by Lamb in all Generic Skills Categories, with the exception of "interpersonal" skills, for which both were rated identically. Lamb did not — and could not — raise a genuine issue of material fact with respect to Fiesel's finding a new position, as Lamb admitted that she did not know what positions Fiesel interviewed for, how many interviews Fiesel had or what efforts Fiesel undertook to find another position within the Bank.

> general reorganization and reduction in the size of the Affluent Marketing Group, and the hiring of officers with better qualifications for the job. Citibank proffers that the white officers brought into the new group had higher performance ratings than plaintiff, higher skill ratings, and longer service in Divisional Marketing. (District Court Opinion, Pet. 19)

Quoting *Burdine*, the District Court stated:

> Plaintiff may satisfy the burden of proving that defendant's stated reasons were merely pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence." (District Court Opinion, Pet. 19).

After correctly setting forth the *Burdine* three-step analysis, and reviewing all the evidence in a light most favorable to the plaintiff, the District Court concluded that Lamb "*neither* establishe[d] that Citibank's proffered reasons were false *nor* that she failed to receive a position because of racial discrimination". (District Court Opinion, Pet. 20) (emphasis supplied) The District Court further noted:

> Plaintiff is unable to adduce any evidence that Citibank's assessments of the white employees' qualifications were inaccurate, let alone racially motivated, and her own "good" ranking and the serious gap in her knowledge of the securities business leaves her claim of "pristine qualifications" without support in the record. (Pet. 20-21)

Thus, the District Court, after referencing *Burdine* for the relevant legal standard (Pet. 19-20), found, as quoted above, that Lamb did not establish that Citibank's proffered reasons were false or that she failed to receive a position because of racial discrimination. It therefore granted summary judgment and dismissed Lamb's Title VII claim.

The Court of Appeals unanimously affirmed the District Court's order in a three sentence opinion, stating in relevant part:

> After examining the record, we conclude that although plaintiff established a *prima facie* case of discrimination, she failed to offer any evidence that Citibank's proffered non-discriminatory reason for her termination was pretextual. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) (Pet. 12).

The Court of Appeals did not cite or rely upon *Hicks* in support of its opinion.

ARGUMENT
REASONS WHY REVIEW IS NOT WARRANTED

I. Summary Judgment Was Appropriate Because Lamb Failed To Offer *Any* Evidence That Citibank's Reasons Were Pretextual.

This case involves nothing more than the lower courts' evaluation of the record evidence (*i.e.*, the undisputed facts) in light of well-established law. Both courts below found that Lamb did not present any evidence whatsoever — let alone raise a genuine issue of material fact — that Citibank's reasons for her termination (through job elimination or subsequent failure to be rehired) were false. (Pet. 12, 20-22) In so finding, the lower

courts found that the so-called "evidence" that Lamb presented consisted of her own unsubstantiated opinions of her "superior qualifications" and similar inadmissible speculation. (Pet. 20-22) Simply stated, the Court of Appeals' three sentence decision affirming summary judgment presents no issue that warrants certiorari.

As applicable here — and properly applied by the Court of Appeals and the District Court — the standard for summary judgment in employment discrimination cases is well-settled. Under this Court's decisions in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981) and their progeny, the plaintiff must establish a *prima facie* case of discrimination. The defendant is then required to offer a legitimate, non-discriminatory reason for its actions.

The employer must prevail if the plaintiff fails to offer any evidence that the proffered reasons are pretextual. *See, e.g., McDonnell Douglas*, 411 U.S. at 807 (if the plaintiff fails to show that the employer's reasons are pretextual, the challenged employment action "must stand"). Consistent with this Court's opinions in *McDonnell Douglas* and *Burdine*, all twelve Courts of Appeals uniformly affirm summary judgment for the employer where the plaintiff has failed to offer evidence of pretext.[5]

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[5] *See, e.g., Smith v. Stratus Computer*, 40 F.3d 11, 14 (1st Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1958 (1995) (affirming summary judgment where plaintiff "failed to adduce sufficient evidence to support a jury finding that [her employer's] stated reason for dismissing her was a pretext for discrimination"); *Bovers v. Flying Tiger Line Inc.*, 979 F.2d 291, 297 (2d Cir. 1992) (affirming summary judgment where "plaintiffs had made no significant showing that the age-neutral bases asserted by defendants were a pretext for discrimination"); *Ezold v. Wolf, Block, Shorr and Solis-Cohen*, 983 F.2d 509, 547 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 88 (1993) (ordering summary judgment where plaintiff failed to show that employer's proffered reason (continued...)

In this case, the Court of Appeals reviewed plaintiff's evidence and agreed with the District Court that Lamb "failed

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[5](...continued)

for failing to promote her was pretextual); *Hughes v. Bedsole*, 48 F.3d 1376, 1385 (4th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 190 (1995) (affirming summary judgment where plaintiff "has failed to identify any jury issue as to whether [her employer's] proffered nondiscriminatory reasons for [her] termination were pretext"); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 817 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 467 (1993) (affirming summary judgment where plaintiff "total[ly] fail[ed] to produce any evidence of pretext"); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 805 (6th Cir. 1994) (affirming summary judgment where plaintiff "has provided no evidence which could show, directly or indirectly, that [his employer's] explanation for [his] demotion was a pretext for discrimination"); *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1260 (7th Cir. 1993), *cert. denied*, ___ U.S. ____, 114 S. Ct. 1372 (1994) (affirming summary judgment where plaintiff had failed "to produce sufficient evidence from which a jury could find that the hospital's stated reason for discharging her . . . was a pretext for discrimination"); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780 (8th Cir. 1995) (affirming summary judgment where plaintiff "failed to demonstrate a genuine issue of material fact as to whether [his employer's] explanation for his termination, i.e., the RIF and [his] low relative assessment score, was a pretext for age discrimination"); *Mundy v. Household Finance Corp.*, 885 F.2d 542, 546 (9th Cir. 1989) (affirming summary judgment where the "circumstances of termination alleged by [plaintiff] fail to raise any genuine issue of pretext"); *Hiatt v. Union Pac. R.R.*, 65 F.3d 838, 843 (10th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 917 (1996) (affirming summary judgment where plaintiffs "failed to offer any evidence that would permit a rational trier of fact to conclude that the defendants' actions were a pretext for intentional and unlawful discrimination"); *Edwards v. Wallace Community College*, 49 F.3d 1517, 1521 (11th Cir. 1995) (affirming summary judgment where plaintiff "has not presented any evidence that the filling of the vacancy by a minority was pretextual"); *Karpinski v. Billington*, No. 93-5269, 1994 U.S. App. LEXIS 9961, *2 (D.C. Cir. Jan. 27, 1994) ("The district court was . . . correct in granting summary judgment on the sex discrimination claim, as the record is devoid of facts to support appellant's contention that the legitimate, non-discriminatory reasons offered for her non-selection were pretextual.").

to offer *any* evidence that Citibank's proffered non-discriminatory reason for her termination was pretextual." (Pet. 12) (emphasis supplied) Lamb acknowledges that she is "not asking this Court to rule on the evidence" (Pet. 8), and concedes that the Court of Appeal's findings must be accepted. As the lower courts found — correctly — that Lamb failed to offer any evidence of pretext, her complaint was properly dismissed, and there is no issue that warrants certiorari.

II. Resolution Of Lamb's Purported "Legal Issue" Is Immaterial To This Case.

Apparently recognizing that the Court of Appeals' decision does not present an issue justifying certiorari, Lamb proposes that this Court review an issue that the Court of Appeals properly did not need to reach, and did not reach, in affirming summary judgment. Lamb asserts — without any support in the decisions below — that the issue before this Court somehow should be:

> In a Title VII employment discrimination case based on race, does the standard of proof on a motion for summary judgment, as explained in *Saint Mary's Honor Ctr. v. Hicks*, require plaintiff to establish the pretextual nature of defendant employer's non-discriminatory explanation by requiring that plaintiff prove both the falsity of the explanation and defendant's discriminatory intent? (Pet. i)

In its one paragraph decision, the Court of Appeals did not, however, cite or rely upon this Court's decision in *Hicks*. To the contrary, it relied expressly and exclusively on *Burdine*. Further, based upon the Court of Appeals' opinion, *Hicks* is not applicable.

In *Hicks*, this Court recently addressed whether, in a suit against an employer alleging intentional racial discrimination, a factfinder's rejection of the employer's proffered reasons for its action mandates a finding for the employee, or whether the plaintiff must also show that discrimination was the real reason for the action. *Hicks*, 509 U.S. at n.4. The issue as presented and decided in *Hicks* therefore arises only after the plaintiff has demonstrated that the employer's proffered reasons are false.

As both lower courts found here, Lamb failed to offer *any* evidence that Citibank's proffered reasons were false, and therefore did not implicate in any manner whatsoever the issue presented in *Hicks (i.e.*, whether pretext or "pretext plus" is the plaintiff's requisite showing). Lamb's petition therefore should be denied, as a so-called "clarification" of this Court's decision in *Hicks* would have no impact upon the decisions below.

Lamb "seeks to invoke the jurisdiction of this Court . . . on the grounds [sic] that the Court of Appeals, in affirming the decision of the District Court, decided a federal question of law in a way that conflicts with applicable decisions of this Court." (Pet. 1) Lamb's statement is simply erroneous because both the District Court and the Court of Appeals applied *Burdine* consistent with the decisions of this Court and *all* twelve Courts of Appeals. Further, as set forth above, the Court of Appeals' decision did not reach the issue addressed in *Hicks*, nor did it rely upon *Hicks*, and therefore cannot conflict with it. Even if *Hicks* were relevant, however, Lamb does not — and cannot — point to any divergence between the lower courts' decisions and this Court's decision in *Hicks*.

Lamb notes that "the District Court relied on language from this Court's decision" in *Hicks*. (Pet. 6) While quoting *Hicks* (along with *McDonnell Douglas* and *Burdine*) in its discussion of the applicable legal standard, the District Court did not have to, and did not, reach the pretext issue presented in *Hicks* as Lamb failed to present any pretext evidence

whatsoever. Even assuming — as Lamb suggests — that *Hicks* requires that plaintiff need show only that the proffered reason is false, summary judgment was appropriate because the District Court held that Lamb failed to meet even this standard. (Pet. 20) (Lamb "*neither* establishes that Citibank's proffered reasons were false *nor* that she that she failed to receive a position because of racial discrimination") (emphasis supplied). Thus, Lamb has not presented any ground to justify this Court's review of *Hicks*.

CONCLUSION

Based on the foregoing, the Court should deny Lamb's Petition for Writ of Certiorari.

Respectfully submitted,

PROSKAUER ROSE GOETZ &
MENDELSOHN LLP

By: Paul Salvatore, Esq.
Counsel of Record for Respondent
1585 Broadway
New York, New York 10036
(212) 969-3022

Of Counsel:

Mark D. Lurie, Esq.